IN THE BOMBAY HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.385 OF 2003

Union of India, through Commander
Works Engineers (P) NW Colaba, Mumbai. ...Petitioner.

vs.

M/s.Karthi Enterprises. ...Respondents.

Mr.Suresh Kumar with R.C.Master, for Petitioner.

Mr.R.D.Surana i/b. A.S.Rai, for Respondents

CORAM: D.K.DESHMUKH,J.

DATED: 28th March, 2005.

P.C.:-

1. By this petition, the Award made by the Sole Arbitrator directing the petitioner to pay certain amounts to the respondents, is challenged. The Award made in relation to claim no.1, claim no.2 and claim no.5, has been challenged. The claim no.1 relates to the claim for less quantity of earthwork measured and application of wrong rate allowed for payment for carting in final

bill. To the claim of the respondents that they are entitled to the star rate which is a higher rate, the defence of the petitioner as mentioned by the Arbitrator himself in the Award is that the respondents have signed DO no.14 for a prorata rate based on SSR for earth carried beyond 10 km. To that, rejoinder of the respondents was that though the DO no.14 was signed by them without protest, they were all along claiming for star rate for the item. The Arbitrator in paragraph 15 accepted that the claim in relation to the quantity of earth excavated was not proved. However, so far as the rate is concerned, though DO no.14 was admittedly signed by the claimant-respondents, the Arbitrator awarded the payment at higher rate only because in a letter written by the Chief Engineer (Navy), Mumbai, he agreed for star rate. The matter would be governed not by what the Chief Engineer of Navy states, but in accordance with the terms of the contract. Therefore, the Award made by the Arbitrator in this regard is clearly contrary to the terms agreed between the parties, and therefore, the Award in this regard, is liable to be set aside.

2. So far as the claim no.2 is concerned, it relates to the payment for moorum at the agreed rate for quantities exceeding DO limit in lieu of contract rate. Admittedly, the contractor-respondents have signed the amendment, agreeing to the rate at which the payment has to be made. The defence of the contractor-respondents was that they signed the amendment under duress.. The learned Arbitrator has rejected the said defence and has held that the contractor-respondents cannot claim that they signed the amendment under duress. Still

the Arbitrator allowed the claim and directed the petitioner to make payment at the higher rate without giving any reason as to why the learned Arbitrator is issuing that direction. The direction is clearly contrary to the amendments, admittedly, signed by both the parties. Therefore, the Award made against claim no.2 is also liable to be dismissed.

3. The next challenge to the Award is in relation to the Award made against claim no.5. The claim no.5 relates to the escalation Admittedly, the contractor-respondents had given an undertaking for freezing the escalation beyond the period 30.9.2004. The Arbitrator, however, has recorded the finding that the respondents have revoked their undertaking not to claim escalation, and has held that the contractor-respondents are entitled to the payment at the escalated rate. I do not find any reason given by the learned Arbitrator for recording the finding that the contractor-respondents have revoked the undertaking and whether that revocation is in accordance with the law. The case of the contractor-respondents was that they have given the undertaking under duress and therefore, undertaking is not binding on them. The learned Arbitrator has not recorded the finding as to how the undertaking was given under duress; and if the undertaking is not given under duress, it is binding on the respondents, therefore, they are not entitled for payment at escalated rate. In the result, therefore, the Award is liable to be modified to the following extent.

4. The Award made by the learned Arbitrator against claim no.1, 2, and 5 is set aside.

5. The Award made by the learned Arbitrator against claim no.7 is modified to the extent that the Award of interest against the amounts which are awarded against the claim nos. 1, 2 and 5, is set aside.

The petition disposed of.

There shall be no order as to costs.

28.3.2005 ---